

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

11 FREDDY CIVIL LOCON,

No. C 10-04367 CRB

12 Plaintiff,

**ORDER DENYING PETITION
FOR WRIT OF HABEAS CORPUS**

13 v.

14 JANET NAPOLITANO,

15 Defendant.

17 Presently before the Court is a Petition for a Writ of Habeas Corpus (“Petition”) filed
18 by Guatemalan native and citizen, Freddy Civil Locon (“Petitioner”). On September 28,
19 2010, following a series of administrative and judicial reviews of an immigration judge’s
20 2004 removal order – which included claims of ineffective assistance of counsel and
21 prejudicial fraudulent misrepresentation by a legal assistant – Petitioner was removed to
22 Guatemala. Several hours after his return to Guatemala, Petitioner filed this Petition.
23 However, as discussed below, because Petitioner was in Guatemala and no longer “in
24 custody,” pursuant to 28 U.S.C. § 2241, when the Petition was filed, this Court lacks subject-
25 matter jurisdiction over the Petition. Accordingly, the Petition must be dismissed.

26 **I. BACKGROUND**

27 Due to the parties’ familiarity with the general sequence of events, the Court sets forth
28 only those facts necessary to frame the issues at bar.

1 On April 16, 1993, Petitioner, a native and citizen of Guatemala, applied for asylum in
2 the United States. Pet. (dkt. 1) Ex. F. In 2002, Petitioner's application was referred to an
3 immigration judge, who, on August 7, 2003, denied his application and ordered him removed
4 to Guatemala. Id. Exs. H, I, M. The Board of Immigration Appeals ("BIA") affirmed this
5 decision on September 8, 2004. Id. Ex. O. In both of these proceedings, Petitioner was
6 represented by attorney Gloria Lopez. Id. Exs. H, K, O.

7 On September 19, 2006, Petitioner, aided by new counsel, Hilari Allred, filed a
8 motion to reopen with the BIA, arguing ineffective assistance of counsel by Lopez and
9 fraudulent misrepresentation by Byron Vasquez – a man who Petitioner claims falsely
10 represented himself as an attorney, when, in fact, he was a legal assistant. Id. ¶¶ 17-19; id.
11 Ex. S. The BIA denied this motion to reopen, and the Ninth Circuit affirmed that denial on
12 appeal. Id. Exs. V, Y.

13 Petitioner then moved the BIA to reconsider, and on May 28, 2010, the BIA denied
14 this motion as time- and number-barred. Id. Ex. BB, CC. Petitioner did not seek review of
15 this denial from the Ninth Circuit. See Return (dkt. 7) at 3.

16 On September 28, 2010, Petitioner was removed to Guatemala – his flight left Mesa,
17 Arizona, at 6:00 a.m. Pacific Standard Time (PST), and arrived in Guatemala City,
18 Guatemala, at 10:19 a.m. PST. Proctor Decl. (dkt. 7-1) Ex. 2. Petitioner filed the instant
19 habeas Petition with the Court at 1:00 p.m. PST, asking the Court to order the BIA to reissue
20 its September 8, 2004 decision so Petitioner can timely seek judicial review. Pet. (dkt. 1) ¶
21 33. In his Petition, Petitioner alleges that Vasquez misrepresented that he was an attorney
22 and that this prevented Petitioner from making such timely review. Id. ¶ 30(a).

23 **II. DISCUSSION**

24 **A. "In Custody" Requirement**

25 **1. Legal Background**

26 As a general matter, district courts have jurisdiction to review aliens' habeas petitions
27 filed under the general habeas corpus statute, 28 U.S.C. § 2241. I.N.S. v. St. Cyr, 533 U.S.
28 289, 298-314 (2001). However, § 2241 provides that "[t]he writ of habeas corpus shall not

1 extend to a prisoner unless . . . [h]e is in custody.” 28 U.S.C. § 2241(c) (emphasis added);
2 see Carafas v. LaVallee, 391 U.S. 234, 238 (1968); Miranda v. Reno, 238 F.3d 1156, 1158-
3 59 (9th Cir. 2001). Whether a petitioner is “in custody” is determined as of the time the
4 petition is filed. Chong v. Dist. Dir., I.N.S., 264 F.3d 378, 382 (3d Cir. 2001) (citing
5 Carafas, 391 U.S. at 331) (finding “in custody” requirement met when alien filed habeas
6 petition before removal).

7 “In custody” is not limited to physical restraint. Carfas, 391 U.S. at 239. Rather,
8 habeas corpus jurisdiction has been extended to individuals who, though not physically
9 restrained, are subject to “restraints on . . . liberty . . . not shared by the public generally.”
10 Jones v. Cunningham, 371 U.S. 236, 240 (1963). However, “there must be a significant
11 restraint on the petitioner’s liberty to satisfy th[e] ‘custody’ requirement.” Patel v. U.S. Att’y
12 Gen., 334 F.3d 1259, 1263 (11th Cir. 2003) (citing cases). In this and other Circuits, removal
13 from the United States does not constitute a significant restraint on an alien’s liberty;
14 therefore, already-deported aliens ordinarily fail to meet the “in custody” requirement.
15 Miranda, 238 F.3d at 1159 (9th Cir. 2001); see Patel, 334 F.3d at 1263 (same); see also
16 Terrado v. Moyer, 820 F.2d 920, 922 (7th Cir. 1987) (habeas petition filed after deportation
17 does not satisfy “in custody” requirement).

18 A narrow exception to this general rule exists for “extreme circumstances” – such as
19 where “the INS remove[s] an immigrant ‘in violation of the immigration judge’s order and
20 after interference with his right to counsel.’” Miranda, 238 F.3d at 1159 (quoting Singh v.
21 Waters, 87 F.3d 346, 349 (9th Cir. 1996)) (finding no “extreme circumstances” meriting any
22 exception where alien was removed pursuant to immigration judge’s order and counsel
23 waived right to appeal order to BIA).

24 **2. The Parties’ Claims**

25 Respondents argue that the present Petition fails to meet the “in custody” requirement
26 because Petitioner had already been removed from the country when the Petition was filed.
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1 See Return (dkt. 7) at 4-5 (citing Miranda, 238 F.3d at 1158). In support of this contention,
2 they submit¹:

- 3 (1) Petitioner's I-205 Form,² stamped: "Chandler[,] Arizona/Williams Gateway
4 Airport³/Date Sep[.] 28, 2010/Via JPATS,⁴" Proctor Decl. (dkt. 7-1) Ex. 1;
- 5 (2) a September 28, 2010 "ICE Charter flight"⁵ itinerary listing Petitioner as a
6 passenger, and documenting departure from Mesa, Arizona at 6:00 a.m. PST, arrival
7 in Guatemala City, Guatemala at 10:19 a.m. PST, and departure again from
8 Guatemala City at 11:19 a.m. PST, id. Ex. 2; and
- 9 (3) the cover of the Petition, stamped as filed in this Court at 1:00 p.m. PST on
10 September 28, 2010, id. Ex. 3.

11 Because Petitioner's 1:00 p.m. PST filing time on September 28, 2010 came after the
12 ICE flight had landed in, and again departed from, Guatemala, Respondents maintain that
13 Petitioner had already been deported when the Petition was filed, and, therefore, was no
14 longer "in custody," as required by § 2241. See Return (dkt. 7) at 4-5.

15 Petitioner contests these submissions as factually erroneous. See Traverse (dkt. 9) at
16 6-8.
17

18 ¹ For ease of understanding the sequence of events, the Court sets forth all times in PST.
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20 ² An I-205 form is the United States Immigration and Naturalization Service's Warrant of
21 Removal/Deportation. See id. Ex. 1; 8 C.F.R. § 299.1.

22 ³ The formerly named Williams Gateway Airport, now Phoenix-Mesa Gateway Airport, is
23 actually located in Mesa, Arizona, approximately ten miles from Chandler, Arizona. See History,
24 PHXMESA GATEWAY AIRPORT, <http://www.phxmesagateway.org/History.aspx> (last visited July 12,
25 2011).

26 ⁴ JPATS, the Justice Prisoner & Alien Transportation System, operates the air fleets for the
27 Marshals Service and the Bureau of Immigration and U.S. Immigration and Customs Enforcement
28 ("ICE"). Justice Prisoner & Alien Transportation System (JPATS), U.S. MARSHALS SERVICE,
<http://www.usmarshals.gov/jpats/> (last visited July 12, 2011); see also supra at 5 n.5. JPATS, *inter alia*,
operates a fleet of aircraft to remove deportable aliens. Id. JPATS has a hub in Mesa, Arizona. Id.

29 ⁵ "ICE" is the U.S. Immigration and Customs Enforcement, and is charged with "apprehend[ing]
30 removable aliens, detain[ing] these individuals when necessary and remove[ing] illegal aliens from the
31 U.S." See ICE Enforcement and Removal Operations, U.S. IMMIGRATION AND CUSTOMS
32 ENFORCEMENT, <http://www.ice.gov/about/offices/enforcement-removal-operations/> (last visited July
33 12, 2011).

1 **3. Petitioner Was Not “In Custody” When his Petition Was Filed**

2 Although Petitioner claims that there are two errors, neither detracts from the
 3 documents’ proof that he filed his Petition after he had been removed. First, Petitioner takes
 4 issue with the fact that the I-205 form’s departure stamp reads, “Chandler[,]
 5 Arizona/Williams Gateway Airport,” while the flight itinerary records departure from “Mesa,
 6 AZ.” Id. However, this typographical inconsistency is inconsequential: Williams Gateway
 7 Airport, a hub for JPATS, is in Mesa, Arizona, approximately ten miles from Chandler; these
 8 documents are consistent as to Petitioner’s place of departure. See supra at 5 n.3. Second,
 9 Petitioner finds error in the submission of an “ICE Charter flight” itinerary, when the I-205
 10 form records Petitioner departing on “via JPATS.” Traverse (dkt. 9) at 6-8. These, too, are
 11 one and the same: JPATS operates chartered ICE removal flights. See supra at 5 n.4.

12 The records in this case thus demonstrate that Petitioner had been removed to
 13 Guatemala several hours before he filed the instant Petition. “No interpretation of § 2241
 14 that is not utterly at war with its plain language permits us to exercise habeas corpus
 15 jurisdiction over . . . [i]mmigrants who have already been removed . . . [and] do not satisfy
 16 the ‘in custody’ requirement of habeas corpus jurisdiction.” Miranda, 238 F.3d at 1159.
 17 Accordingly, this Court lacks subject-matter jurisdiction hear Petitioner’s claims.

18 Further, this Petition does not fall under Waters’ “extreme circumstances” exception.
 19 Petitioner here was removed pursuant to an immigration judge’s order, following a full
 20 process administrative and judicial review – both of his removal order⁶ and his ineffective-
 21 assistance-of-counsel and fraudulent-misrepresentation claims.⁷

22
 23 ⁶ Petitioner’s removal order was reviewed by the BIA and the Ninth Circuit on multiple
 24 occasions, and Petitioner has not sought review of the last May 28, 2010, BIA decision denying his
 25 motion for reconsideration. See Pet. (dkt. 1) Exs. S, Y, CC. Nor does Petitioner challenge this decision;
 26 rather, Petitioner brings claims of ineffective assistance and fraudulent misrepresentation against
 27 Vasquez. Id. ¶¶ 27-30 However, the claims against Vasquez have already been heard, as well. See infra
 28 at n.7.

29 ⁷ Petitioner was heard by the BIA on September 19, 2006, on his ineffective assistance claim as
 30 to Lopez and his misrepresentation and fraud claims against Vasquez, in connection with his motion to
 31 reopen. See Pet. (dkt. 1) Ex. S, at 6-22. During this proceeding, Petitioner was represented by counsel
 32 Allred, against whom Petitioner makes no ineffective-assistance claim. See id. at 24. The Ninth Circuit
 33 affirmed this decision on November 30, 2009. See id. Ex. Y.

1 Nor does Petitioner find jurisdictional relief from Singh v. Gonzales, 499 F.3d 969
2 (2007). Gonzalez deals with the reach of the REAL ID Act's⁸ "jurisdiction-stripping
3 provisions," which generally stripped district courts of jurisdiction to review removal orders.
4 Gonzalez, 499 F.3d at 971-72; see 8 U.S.C. § 1252(a)(5). In Gonzalez, the Ninth Circuit
5 held that district courts, nevertheless, may retain jurisdiction over "a narrow claim of
6 ineffective assistance of counsel in connection with a post-administrative filing of an appeal
7 with the court of appeals." Id. at 981. However, Gonzalez strictly limited its holding to the
8 scope of the REAL ID Act's "jurisdiction-stripping" and did not eliminate or otherwise
9 impinge upon the "in custody" requirement. Id. at 981; see, e.g., Gutierrez-Ramos v. Martin,
10 No. SACV 08-0040GPSJTL, 2008 WL 2811497, at *1-2 (C.D. Cal. July 21, 2008) (declining
11 habeas jurisdiction over claims filed after REAL ID Act and after petitioner had been
12 deported because he was not "in custody").

13 **III. CONCLUSION**

14 For the reasons set forth above, the Petition for Writ of Habeas Corpus is dismissed
15 for lack of jurisdiction.

16 **IT IS SO ORDERED.**

17 Dated: July 14, 2011



CHARLES R. BREYER
UNITED STATES DISTRICT
JUDGE

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⁸ Pub. L. No. 109-13, § 106(b), 119 Stat. 231, 310 (2005) (codified at 8 U.S.C. § 1252(a)(5)).